U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

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CASE NOS.: 2000-LHC-03219
2001-LHC-00979

OWCP NOS.: 01-133766
01-112210

In the Matter of

CHARLES J. TASCA, Jr.
Claimant

v.

ELECTRIC BOAT CORPORATION
Self-Insured Employer

Appearances:

Carolyn P. Kelly, Esquire (O'Brien, Shafner, Stuart, Kelly & Morris), Groton, Connecticut, for the Claimant

Edward W. Murphy, Esquire (Morrison, Mahoney & Miller), Boston, Massachusetts, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Charles J. Tasca, Jr. (the Claimant), a former shipyard worker, against his former employer, Electric Boat Corporation (the Employer), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law Judges for a formal hearing which was

conducted before me in New London, Connecticut on March 20, 2001. The hearing afforded all parties an opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The Testimony was elicited at the hearing from two witnesses, the Claimant and a vocational expert called by the Employer, and documentary evidence was admitted without objection as Claimant's Exhibits CX 1-62 and Employer's Exhibits RX 1-33. TR 8, 10-12, 81.[1] At the close of the hearing, the record was held open for submission of a deposition to be taken post-hearing and closing argument. TR 107. Withing the post-hearing time frames, the Employer offered the transcript of the testimony of Robert I. Moskowitz, M.D. taken on April 10, 2001 which has been admitted as RX 36. In addition, the Employer offered a *curriculum vitae* and medical records from V.A. Montemarano, M.D. which have been admitted without objection as RX 34 and 25, and the Claimant offered a letter dated July 16, 1995 from Peter B. Himmel, M.D. which has been admitted without objection as CX 63. Finally, both parties filed briefs, and the record is now closed.

After careful analysis of the evidence contained in the record I have concluded that the Claimant is entitled to an award of a permanent total and permanent partial disability compensation, medical care for his work-related injuries, interest on unpaid compensation and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

There are two claims involved in this proceeding, OWCP No. 01-133766 which concerns a back injury and OWCP No. 01-112210 which concerns injuries to the left hand, neck and back. The parties have entered into the following stipulations regarding both claims:

A. Stipulations Relating to OWCP No. 01-112210 (ALJX 15)

(1) the Claimant fell off of a ladder on March 16, 1990 in Groton, Connecticut, injuring his hand, neck and back;

(2) the parties are subject to the Act;

(3) an employer-employee relationship existed at the time of the injury;

(4) the injury arose in the course and within the scope of employment;

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[1] Documentary evidence will be referred to herein as "CX" for an exhibit offered by the Claimant, "RX" for an exhibit offered by the Employer, and "ALJX" for the formal papers. References to the hearing transcript will be designated as "TR".

(5) the Employer was timely notified of the injury on March 16, 1990;

(6) timely notice of the injury was given to the Secretary of Labor, and a timely notice of controversion was filed;

(7) the informal conference was held on May 31, 2000;

(8) disability resulted from the injury;

(9) medical benefits have been paid pursuant to section 7 of the Act in the approximate amount of $13,274.00;

(10) the Claimant was paid a total of $26,226.80 in temporary total disability compensation from April 4, 1990 to September 3, 1996 and a total of $10,862.97 in temporary partial disability benefits from August 21, 1992 to August 31, 1998; and

(11) the Claimant's average weekly wage is $463.60 with a compensation rate of $309.22.

B. Stipulations Relating to OWCP No. 133766 (ALJX 14)

(1) the Claimant injured his back while pulling on tape on April 21, 1995 in Groton, Connecticut;

(2) the parties are subject to the Act;

(3) an employer-employee relationship existed at the time of the injury;

(4) the injury arose in the course and within the scope of employment;

(5) the Employer was timely notified of the injury on May 8, 1995;

(6) timely notice of the injury was given to the Secretary of Labor, and a timely notice of controversion was filed;

(7) the informal conference was held on May 31, 2000;

(8) disability resulted from the injury;

(9) medical benefits have been paid pursuant to section 7 of the Act in the approximate amount of $20,579.00;

(10) the Claimant was paid a total of $56,719.25 in temporary total disability compensation from May 30, 1995 April 21, 2001, a total of $43,184.00 in temporary partial disability benefits from September 3, 1996 to September 30, 1998, and a total of $4,000.00 in scheduled permanent partial disability benefits on July 24, 1995; and

(11) the Claimant's average weekly wage is $601.00 with a compensation rate of $401.00.

The parties further stipulated with respect to OWCP No. 01-112210 that the existence of a permanent disability and the date of maximum medical improvement are disputed and that the unresolved issues are (1) the nature and extent of disability, (2) whether the Claimant has a residual earning capacity and (3) the disability rating for the Claimant's left hand. ALJX 14 at 2. With respect to OWCP No. 01-133766, the parties stipulated that the unresolved issues are (1) the nature and extent of disability, (2) whether the Claimant has a residual earning capacity, and (3) whether the Claimant's current disability arises from the 1990 injury or the 1995 injury and, consequently, whether the Claimant's average weekly wage of $463.60 or $601.00 is applicable. ALJX 15 at 2.

III. Summary of the Evidence

A. The Claimant's Testimony

The Claimant, Charles J. Tasca, Jr., was born on May 21, 1946, making him 54 years old at the time of the hearing, and he received a high school diploma. After high school, he went to work at a municipal water department and then was hired by the Employer in approximately 1965. TR 23, 26. He testified that he was injured during 1995 while working at the Employer when his left hand became caught in a grinding wheel which severed three tendons. The Claimant underwent surgery for this injury and was in a full cast from his hand to shoulder for approximately six months. TR 26-27. He testified that he eventually returned to work at the Employer, but he was not allowed back on the boats because he could not climb ladders. Instead, he was assigned to an inside electrical shop where he worked on electrical components. TR 27-28. He stated that he never regained full motion of three fingers on his left hand after the 1966 injury. TR 51.

The Employer subsequently terminated the Claimant's employment in a layoff, and he went to work as an electrician and electrical assembler at Harris Graphics from 1968 to 1989. TR 23-26. The Claimant testified that his job at Harris Graphics was eliminated as a result of a foreign acquisition of the firm, and he was rehired by the Employer as an outside machinist in 1989. TR 23, 28. The Claimant testified that the outside machinist job consisted of installing heavy components in submarines under construction at the Employer's shipyard. TR 24. He stated that his job required him to climb ladders while carrying components and a bag of tools weighing approximately 30 pounds to get to work areas on the submarines. TR 25. He further stated that his work at times was performed in very tight spaces where he had to maneuver components weighing hundreds of pounds. TR 26.

The Claimant further testified that he suffered a second injury while working at the Employer on March 16, 1990 when his left hand gave out as he was attempting to descend a ladder on a boat with bag of tools. He stated that he fell approximately eight feet through a hatch, landing on a steel plate and injuring his left hand, back, neck and right foot. TR 29, 54. He went to the Employer's Yard Hospital which sent him home. The Claimant said that he began to suffer low back and left hand pain and experienced a significant loss of the grip strength. He then sought medical treatment and was out of work for approximately one year. TR 29-30. When the Claimant was able to return to the Employer from this injury, he was assigned to work as a toll crib attendant, a light job which consisted of dispensing tools to machinists. TR 31. The Claimant stated that he worked in the tool crib for about a year before he was transferred to another light duty job inside a machine shop where he worked on "deburring" metal components at a bench using an air gun or hand file. TR 32-33.

In the Fall of 1993, the Claimant was assaulted outside of work. He testified: "Some guys threw a stone at my vehicle. I got out, and I got jumped, and I got knocked out." TR 64-65. He stated that he sustained a concussion but denied that his complaints of tingling in his arms first originated after the assault. TR 65.

Regarding the April 1995 injury, the Claimant testified that he was working inside the machine shop, and his boss assigned him to remove rubber that had been glued to a large piece of metal. He stated that he bent over to rip the rubber off, and "just pulled my whole back right out again." TR 34. He went to the Yard Hospital and then to his family doctor who kept him out of work for about ten days with pain medication and home therapy. TR 35. The Claimant stated that he then returned to work at the Employer, and he was reassigned to a room where he disbursed components to supervisors and work leaders and recorded these transactions in a book. TR 35-36. Although he was able to perform this job from a seated position, the Claimant testified that his back got progressively worse with sciatic pain and his left leg giving out. He said that the pain got so bad that he had to go to the Lawrence and Memorial Hospital for pain management and cortisone shots which alleviated the pain to a point where he could function, though his left leg continued to give out on a regular basis. TR 36-37. The Claimant attributed a second non-occupational accident in June 1999, when he fell down a flight of stairs and fractured his ankle, to his left leg giving out on him. TR 67.

The Claimant testified that he continued to work for the Employer in the parts room job until he was laid off in January 1996. TR 37. He then went to work for the M.J. Murphy Company, a garbage disposal firm where he did general office work including telephone answering, customer service, monitoring bill payments and scheduling pickups. TR 37-38, 67-68. The Claimant earned $5.00 to $6.00 per hour on this job which he held for about a year and one half until the company went out of business. TR 38, 73.

In addition to the job at the M.J. Murphy Company, the Claimant testified that he had two other brief periods of work since leaving the Employer in January 1996. He stated that he tried working at a job which involved collecting cardboard, but he could not tolerate the work because it

required walking and standing for eight hours per day. TR 38-39. More recently, he obtained a job as a security officer on the third shift at the Foxwoods Casino. He began work on March 18, 2001, earning $8.50 per hour. However, he was unable to tolerate walking almost the entire shift. He had hoped that he would be able to do this job without pain medication but said that he had to take two Percocets when he got home after working one shift. TR 43. The Claimant also testified that he had applied for several jobs at the Foxwoods Casino, but the security guard position was the only one available at the particular time that he accepted employment in March 2001. TR 70.

The Claimant further testified that he looked without success for other telephone or dispatch jobs that he felt he could do, and he kept "job search sheets" (CX 61) from February 1999 until March 2000 when he started to go to physical therapy again. TR 38-40. After deciding that he could not perform the security job at the Foxwoods Casino, the Claimant stated that he had inquired about a job as a sales representative clerk at an automobile dealership and that he planned to drop off an application after the hearing. He said that this job would pay $7.00 per hour and that he thought that he could do the work as it would primarily involve sitting at a desk and calling customers to make sure they were satisfied. TR 45-46.[2]

As for his current condition and physical limitations, the Claimant stated that he could sit for approximately an hour and a half to two hours but then would have to get up and walk around. TR 46. He stated that he is unable to sleep through the night due to pain and that he usually takes two Percocet tablets per day for pain relief. TR 47-48. He stated that he is able to function on the pain medication and is not aware of any side effects. TR 76. He said that it would be impossible for him to return to his job at the Employer as outside machinist because he can not lift and function normally. He explained that he had been very athletic in the past, playing golf every day of his life, enjoying physical activities with his two sons and doing work around his house. Now, however, he stated that he has gained weight and is unable to do a lot of these things any more. TR 48. The Claimant also testified that, in addition to his back and neck problems, he has begun to experience symptoms with his knees. He said that his left knee has been buckling on him for the past three years and that the right knee has recently become symptomatic as he has been favoring it over the left. TR 75-76.

B. Reports and Testimony of the Employer's Vocational Expert

The Employer called Kathleen E. Dolan, a certified rehabilitation counselor since 1998, who testified that she prepared labor market surveys after reviewing pertinent records and listening to the Claimant's testimony at a deposition taken on March 1, 2001. TR 83, 86-87. In her first labor market survey which was prepared in December 2000, Ms. Dolan identified the following jobs which she

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[2] Neither of the parties offered any evidence post-hearing regarding the outcome of this job application, although it is noted that the Claimant's attorney states in her brief that, despite subsequent follow-ups, the Claimant has not been hired. Claimant's Memorandum of Law at 7.

described as compatible with the Claimant's experience and physical limitations: two jobs as a small products assembler paying $8.65 and $7.37 per hour, two positions as a hotel front desk clerk paying $7.50 to $8.00 per hour, two security guard jobs paying $7.00 to $9.00 per hour, one job as a retail store customer service clerk paying $7.50 per hour; one job as a casino host paying $8.12 per hour, one job as a cashier/clerk paying $7.00 per hour and one job as driver for an automobile parts store paying $6.75 per hour. RX 30. In a second labor market survey prepared in March 2001, Ms. Dolan six additional positions as being compatible with the Claimant's experience and limitations: full-time front desk clerk at the Marriott Hotel in Mystic, Connecticut at $7.25 per hour; full-time front desk agent at the Foxwoods Casino in Pawcatuck, Connecticut at $8.12 per hour; full-time front desk clerk at the Howard Johnson's Hotel in Mystic, Connecticut at $7.00 to $9.00 per hour; full or part-time security guard at Ace Security in New London, Connecticut at $9.00 per hour; full or part-time customer service representative at Girard Nissan in Groton, Connecticut at $7.50 per hour plus incentives; and full-time second shift "greeter" at Walmart in Groton, Connecticut at $7.50 per hour. RX 32. Ms. Dolan stated that she developed a profile for the Claimant based on his work history, transferable skills, and the functional restrictions identified by the Claimant and by Dr. Moskowitz. TR 87-88. In particular, she stated that she took into consideration the Claimant's self-described limitations to work which would allow him to alternate between sitting and standing and which would not require much bending, stooping or driving. TR 89-90. She then looked for job openings in the area which might be compatible with the Claimant's skills and limitations, and she testified that she personally met with the prospective employers listed in her labor market survey to determine whether they would accommodate an individual with the Claimant's limitations. TR 88-89. Ms. Dolan testified that she felt the Claimant would be qualified for the hotel desk clerk and customer service representative jobs based on his transferable skills and his good employment record, and she conservatively estimated that he could earn between $7.00 and $9.00 per hour on a full-time basis. TR 91-92.

On cross-examination, Ms. Dolan acknowledged that some of the security jobs in her survey may involve patrolling which would require walking or standing for most of a shift, but she added that the manager of the security firm informed he that they usually hire individuals who have been injured on prior obs and that they work with these individuals to accommodate their limitations such as an inability to stand or walk for prolonged periods. TR 95-96. She also conceded that the assembler positions would not be appropriate given the Claimant's limitations. Regarding the hotel desk clerk positions listed in her survey, Ms. Dolan testified that she had not previously been able to place an injured worker with an industrial or "blue collar" work history in one of these jobs, and she stated that she could had no explanation for why the Claimant had not been hired at the Foxwoods Casino in view of his testimony that he had submitted several applications for jobs there. TR 97. Ms. Dolan acknowledged that there might be a bias in the hotel industry against a job applicant whose work experience, like the Claimant's, was limited to industrial or blue collar work because such an individual might lack appropriate language skills and personality traits. TR 102-103. With respect to the "greeter" position at Walmart, Ms. Dolan stated that the company preferred its greeters to stand, though a stool is provided for them to occasionally "lean" on. TR 101.

C. The Medical Evidence[3]

The medical records show that the Claimant was seen by Steven B. Carlow, M.D. on March 20, 1990, four days after his reported fall off of the ladder at work. Dr. Carlow's assessment at this time was a status post laceration and tendonitis involving the left extensors on the dorsum of the left hand and a lumbosacral strain. He held the Claimant out of work for an initial period of eight days. CX 2; RX 2, 3. The Claimant was next seen on March 28, 1990 by Philo F. Willetts, Jr., M.D. with complaints of increased left hand pain. Dr. Willetts examined the Claimant and reported an assessment of trauma to the left hand with edema superimposed on pre-existing severed extensor tendons to the long, ring and small fingers. He also stated that he felt that the Claimant has sustained a lumbar sprain and possible herniated disc in the fall of the ladder, and he continued to hold the Claimant out of work. CX 3. Dr. Willetts continued to treat the Claimant, and on May 15, 1990, he released him to return to work with restrictions against bending for more than two hours, climbing ladders or lifting over ten pounds with his left hand. CX 7, 8.

In July 1990, the Claimant underwent an independent medical examination at the Employer's request by Glen Dubler, M.D., an orthopedic surgeon. Dr. Dubler provided a diagnosis of (1) cervical and lumbar strain and (2) status post multiple extensor tendon lacerations, left hand with newly diminished grip strength. Dr. Dubler stated that his diagnosis was causally related to the March 16, 1990 workplace accident, and he noted that although the Claimant has a pre-existing left hand injury, his diminished grip strength appeared related to the March 16, 1990 injury. He further stated that could not return to his normal duties as an outside machinist, and he recommended that the Claimant be returned to work as an inside or "shop" machinist which would not require climbing ladders and staging. RX 6.

The Claimant continued to complain to Dr. Willetts of back and neck pain after he returned to work, and he was ultimately referred to Peter B. Himmel, M.D. RX 7; CX 10, 12. In April 1992, Dr. Himmel ordered an MRI examination which revealed a narrowing of the disc spaces at C3-4 and C5-6 with associated spurring, and early degenerative changes in the form of sclerosis of the facets at L5. CX 10 at 7. In June 1992, Dr. Himmel restricted the Claimant to no bending, climbing heights, lifting over 35 lbs, left hand tool use, or reaching above the shoulder. CX 10 at 9. The Claimant had another MRI of the cervical spine in January 1993 which showed a central disc bulge at C3-4 and C5-6 with some foraminal encroachment. CX 17. Dr. Himmel then referred the Claimant to Carlo G. Brogna, a neurologist, for further evaluation and treatment. CX 19, 20.

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[3] The record contains nearly 100 separate exhibits, most of which are reports from medical providers. Although all of this evidence has been reviewed and considered, the summary of the medical evidence is limited to that which most directly bears on the issues to be adjudicated.

Dr. Brogna examined the Claimant in April 1993 and reported the following impressions: (1) neck pain and headache syndrome secondary to irritation of neck structures and occipital nerves producing bimonthly migraine headaches; (2) mechanical low back pain most likely due to facet joint irritation; (3) right hand tingling due to mild ulnar nerve irritation at the elbow; and (4) right foot tingling due to mild tarsal tunnel syndrome. He prescribed medication, exercise and weight loss, and he expressed a hope that, with treatment, the Claimant would be able to return to normal work. CX 20; RX 8. Dr. Brogna also reported that his motor examination revealed weakness in the extensor muscles on three of the Claimant's left fingers which he attributed to a prior injury. *Id.* at 2.

Records from the Claimant's family doctor, Vincent Montemarano, M.D., and the Westerly (Rhode Island) Hospital show that the Claimant was hospitalized from October 25-27, 1993 after he was assaulted, beaten and knocked unconscious, leaving him with multiple contusions and a cerebral concussion. RX 35. Following his discharge from the hospital, the Claimant was referred to neurologist Gary A. L'Europa, M.D. Dr. L'Europa examined the Claimant in January 1994 and noted the Claimant's history of an assault-related concussion and complaints of recent upper extremity paresthesia, more severe on the right than on the left. His motor, sensory and needle examinations were normal as was a nerve conduction study. Based on these findings, Dr. L'Europa reported that there was no evidence of cervical radiculopathy, entrapment neuropathy, peripheral neuropathy or carpal syndrome. He recommended another MRI scan of the cervical spine as well as routine blood testing. RX 9.

The follow-up MRI recommended by Dr. L'Europa was conducted in February 1994 and revealed small herniated discs at the C3-4 and C5-6 levels described as old and partially covered by osteophyte formation. CX 26, 27. The Claimant continued to see Dr. L'Europa through 1994, complaining primarily of right arm numbness. CX 28, 30, 32. He also continued to work at the Employer during this period on restricted duty. CX 29, 31.

Dr. Himmel's office notes reflect that he saw the Claimant on April 14, 1995 at which time the Claimant reported that he " hurt back a little the other day pulling rubber off." CX 60 at 1.[4] The Claimant subsequently sought treatment on April 28, 1995 from Dr. Montemarano who diagnosed an acute back strain. RX 10. On May 4, 1995, Dr. Montemarano wrote a note excusing the Claimant's absence from work and stating that he could return on May 8, 1995. CX 33. Dr. Himmel's office notes indicate that he continued to follow the Claimant during 1995 and 1996 in regard to his complaints of back pain following the April 1995 injury. CX 61.

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[4] It is noted that Dr. Himmel's records, which place the date of the work-related back injury sometime prior to April 14, 1995, are inconsistent with the parties' stipulation that the injury occurred on April 21, 1995 and with Dr. Montemarano's Attending Physician's Report which also lists the date of the injury as April 21, 1995. RX 10. This discrepancy does not appear significant, however, as the parties agree that the Claimant sustained a work-related injury to his back sometime in April 1995.

The Claimant was examined in November 1995 at the Employer's request by surgeon Joseph P. Zeppieri, M.D. Based on his examination and review of the Claimant's medical history and records, Dr. Zeppieri observed that the Claimant has complained of persistent neck and back pain since the March 16, 1990 work-related injury, and he recommended discontinuance of heavy narcotics such as Percocet. He also noted that the Claimant had suffered tendon lacerations in his left hand as a result of a work-related accident in 1965, stating that there was scarring but normal function in the hand. Dr. Zeppieri commented that the MRI results provided objective evidence related to the Claimant's cervical complaints and that a bone scan showed L5-S1 lumbar facet pathology. He concluded that, using the American Medical Association Guides to the Evaluation of permanent Impairment, 4th Edition (the AMA Guides) he would assign the Claimant as 5% permanent impairment of the cervical spine, a 5% impairment of the lumbar spine and no loss of the left upper extremity. RX 13.

Dr. Zeppieri conducted a second examination in June 1996 at which time he found no change in the Claimant's condition and reiterated his opinions regarding the extent of the Claimant's permanent neck and lower back impairments. Noting that the Claimant reported no improvement in his symptoms, he stated that the Claimant had reached maximum medical improvement as of June 5, 1994. He further stated that he would attribute the Claimant's impairment entirely to the March 16, 1990 work-related injury as there were no other known back or neck injuries, although he did acknowledge that the Claimant did experience a recurrence of back pain in 1995 while pulling rubber at work. RX 15.

Dr. Zeppieri testified at a deposition taken on April 7, 1998. RX 18. He stated that the Claimant had significant limitations of function as a consequence of his March 16, 1990 work-related injuries. *Id.* at 11. Dr. Zeppieri further stated that the Claimant's disability was not solely caused by the subsequent back injury in April 1995 and that any back injury sustained in April 1995 did not make the Claimant's disability materially and substantially greater. *Id.* at 12. He explained that the Claimant had described the April 1995 injury as minor, and he noted that there was already ample evidence of significant pre-existing injury or disease in the Claimant's back. *Id.* at 13. Dr. Zeppieri further testified that it was his opinion that the 1990 injury did not aggravate the earlier left hand injury at all. *Id.*

In April 1996, Dr. Himmel wrote on a prescription pad that there had been no change in the status of the Claimant's disability and that his restrictions remained the same. CX 35. At this point in time, the Claimant was referred by Dr. L'Europa to neurologist Gus G. Stratton, M.D. Based on a physical examination and review of the Claimant's history, Dr. Stratton's impression was bilateral upper extremity paresthesias of unknown etiology, and he recommended neurophysiologic studies to determine the cause. He also commented that based on the Claimant's history, his symptoms were causally related to the March 16, 1990 injury, but he related the Claimant's left hand injury to the accident and subsequent surgical repair approximately 20 years earlier. CX 36. In May 1996, Dr. Stratton performed the recommended neurophysiologic testing of the Claimant's upper extremities to further investigate symptoms of bilateral upper extremity paresthesias which, according to Dr. Stratton, the Claimant related to his March 16, 1990 injury at the Employer. Dr. Stratton conducted a nerve conduction study (NCV) and electromyography (EMG) testing. He reported that the test results were

normal and that there was no neurophysiologic evidence for cervical radiculopathy, brachial plexopathy or peripheral entrapment neuropathy. He stated that he could not explain the Claimant's upper extremity paresthesias. He also stated that the Claimant's symptoms related to the fingers on his left hand might be related to the digital branch of the ulnar nerve which is difficult to study by EMG testing. CX 37; RX 14.

In a letter dated July 16, 1995 to the Claimant's attorney, Dr. Himmel stated that the Claimant had a 10% impairment of the whole person based on pain, limitation of movement and intermittent radiculopathy of the lumbar spine; a 15% impairment of the whole person based on pain, limitation of movement and intermittent radiculopathy of the cervical spine; and a 30% impairment of the left upper extremity for the loss of use of the fourth and fifth fingers which he equated to an 18% disability of the whole person. CX 63. In a subsequent letter dated August 2, 1996, Dr. Himmel wrote that he had "recalculated his calculations with respect to the degree of impairment that Mr. Tasca has suffered in his cervical and lumbar spine" to reflect an 18.75% impairment to the cervical spine and a 11.11% impairment of the lumbar spine. CX 38.

In November 1996, the Claimant underwent a MRI scan of his lumbar spine which revealed minor degenerative changes and a possible mild impingement of the left S1 nerve root by what was described as an "old focal protrusion/bulge" at the L5-S1 level. CX 40. In December 1996, the Claimant was seen by Stephen P. Gross, M.D. to review the results of the MRI. Dr. Gross reported that the Claimant's main concern at this time was not his back but his neck as he was complaining of neck pain with discomfort in the right shoulder and numbness in the right thumb. Dr. Gross referred the Claimant for EMG and nerve conduction studies to rule out cervical radiculopathy. CX 41. Pursuant to Dr. Gross's referral, the Claimant was seen by neurologist Laurence I. Radin, M.D. on January 17, 1997. Based on his findings from a nerve conduction study, Dr. Radin reported that there was no evidence of carpal tunnel syndrome, ulnar neuropathy, diffuse peripheral polyneuropathy or focal median neuropathy of the Claimant's fingers. Dr. Radin also reported that the Claimant declined an EMG study to rule out cervical radiculopathy. RX 16.

In June 1997, the Claimant returned to Dr. Gross. Dr. Gross assessed the Claimant as suffering from symptoms related to a herniated lumbar disc with left-sided lumbar radiculopathy, and he referred the Claimant to Edward P. Hargus, M.D. who performed a series of epidural steroid injections to treat the Claimant's back symptoms related to a herniated lumbar disc. RX 17; CX 45-47. In July 1997, Dr. Gross reported that the Claimant's back examination was entirely normal after the third epidural steroid treatment. RX 17.

Office notes from Dr. Himmel reflect that the Claimant began to complain in November 1997 of renewed lower back pain as well as neck pain and frustration over his condition. CX 48. He underwent a course of physical therapy but continued to complain of lower and upper back pain with occasional sciatic pain and constant pain at the level of 4-5 on a scale of 10. CX 49-51. Dr. Himmel's notes for the period of August 1998 through December 1999 show that the Claimant continued to

complain of pain in his neck, lower back and shoulder blades and that he also complained at times of left hand pain, loss of sensation in his legs, and right hand and foot pain. Dr. Himmel continued to prescribe Percocet for these complaints. CX 52.

In September 1998, the Claimant was referred by Dr. Gross, on the recommendation of his physical therapist, for an evaluation by Edward G. Allcock, D.O., a specialist in rehabilitation medicine and pain management. CX 51; RX 19. Dr. Allcock's findings were essentially normal, and he recommended the use of anti-depressant medication, support and additional therapy to improve the Claimant's level of functioning. RX 19.

In February 1999, the Claimant was seen at the Employer's request for an independent medical examination of his upper extremities by Thomas Cherry, M.D. Dr. Cherry agreed with Dr. Willetts's opinion that the Claimant's diminished grip strength is attributable to the 1990 injury, and he stated that he would assign an additional 2% permanent disability rating to the Claimant's left hand for the limitations resulting from the 1990 injury. He further stated that he did not feel that the Claimant had any vocational restrictions with respect to the use of the left hand, although he acknowledged the Claimant's belief that his actual disability is greater than he was able to objectively support through his evaluation. RX 20.

Dr. Himmel referred the Claimant back to Dr. L'Europa for further evaluation in January 2000. At that time, Dr. L'Europa reported that the Claimant presented himself with complaints of daily and constant paresthesias involving the ball of his right foot and third, fourth and fifth toes, as well as a "pins and needles" sensation in the thighs, right arm and finger numbness, constant low back pain radiating toward the thoracic spine, and progressively severe cervical pain since 1995. Dr. L'Europa's impressions were (1) posterior cervical pain with upper extremity paresthesias and (2) lower back pain with lower extremity paresthesias. He recommended further EMG and nerve conduction studies to be possibly followed by another MRI. CX 54. Dr. L'Europa conducted nerve conduction studies and needle exams on the Claimant's upper extremities on February 15, 2000 and lower extremities on February 22, 2000. The studies were normal, and Dr. L'Europa reported that there was no neurophysical evidence of cervical or lumbar radiculopathy or entrapment neuropathy. RX 23, 24.

The Claimant was next examined in March 2000 at the Employer's request by Eric N. Thompson, M.D. who was asked to specifically address the Claimant's April 1995 back injury. He reviewed the medical records and physically examined the Claimant, finding no objective deficits or abnormalities. He stated that it appeared from the Claimant's account that he had suffered a musculo-ligamentous strain, and he expressed surprise that the back injury had not received more attention from the several physicians who had seen the Claimant over the past five years if the injury was as disabling as then described by the Claimant. Noting that the Claimant's complaints were entirely subjective, he stated that he found no evidence upon which he could base a permanent partial impairment resulting from the April 1995 back injury. Dr. Thompson stated that it was his opinion that none of the Claimant's extremity complaints, including the numbness and tingling paresthesias in the lower

extremities, are causally related to the back injury. He further stated that it was unlikely that any residua from the April 1995 injury would lead to degenerative changes or require formal treatment in the future, and recommended symptomatic treatment such as topical heat, massage and stretching. RX 24.

Dr. L'Europa referred the Claimant to physical therapy in March 2000. CX 56; RX 25. Records from the physical therapy department at the Westerly (Rhode island) Hospital indicate that the Claimant's initial chief complaints involved his low back and left leg. RX 26. After three weeks of therapy, the Claimant reportedly stated that his neck and low back felt fine, but he continued to complain of knee pain and minimal to moderate mid/upper back pain. RX 27.

In October 2000, the Claimant underwent yet another independent medical examination at the Employer's request, this time by Robert I. Moskowitz, M.D. According to Dr. Moskowitz, the Claimant gave a history of injuries to his neck, low back and left hand in 1990 and an injury to his left shoulder blade in 1995. His only significant finding on physical examination was swelling in the Claimant's left lower extremity all the way down to his foot. Dr. Moskowitz's diagnosis was low back pain, a cervical strain and numbness of both hands of questionable etiology. He concluded that the Claimant's prognosis was poor from a subjective perspective, although he noted that objectively it should be far better. He further concluded that, based on the Claimant's history, there was some causal relationship between the diagnosis and the work injury. He stated that he did not believe that further treatment would alleviate the Claimant's subjective complaints, and he stated that he believed that the Claimant had reached a point of maximum medical improvement. Finally, Dr. Moskowitz stated that he believed that the Claimant could work although he added that the Claimant's knee and leg problems, which he characterized as not work-related, would limit his ability to work. RX 28. In a subsequent report dated November 20, 2000, Dr. Moskowitz stated that the Claimant had no significant restrictions attributable to his work-related complaints. He further stated that the Claimant could lift up to 50 pounds frequently and up to 70 pounds occasionally but should avoid repetitive bending. RX 29. In a third report dated February 27, 2001, Dr. Moskowitz stated that he had reviewed the Claimant's medical records and that it was his opinion after reviewing Dr. L'Europa's reports that the Claimant's upper extremity paresthesias had nothing to do with any work-related injury as such complaints were not made after the 1990 injury and came before the 1995 injury. He also stated that he disagreed with the 2% permanent disability rating assigned by Dr. Cherry to the Claimant's left hand because he found no objective evidence of disability in his examination. Dr. Moskowitz did, however, agree with Dr. Zeppieri's rating of a 10% permanent partial disability for the Claimant's spine, and he concurred with Dr. Zeppieri's opinion that the Claimant's 1995 injury had nothing to do with his current complaints. Finally, Dr. Moskowitz revised his recommended restrictions to lifting up to 30 pounds frequently and up to 50 pounds occasionally. RX 31.

Dr. Moskowitz testified at a deposition taken on April 10, 2001. RX 36. He testified that his medical practice consists of performing an average of three "independent medical examinations" per week for insurance companies as he stopped seeing patients in June or July 2000. *Id.* at 18-21. Dr. Moskowitz further testified he did not have a recollection at the deposition of the medical records he

had reviewed in preparing his reports and that "whatever was said in the report is all that I can stand to." *Id.* at 24-25. He stated that in his past practice and treatment of orthopedic patients, he had encountered patients where symptoms come and go. *Id.* at 25. He also agreed that pain is a symptom of an injury or problem, that pain can be serious and debilitating, and that he has on occasion treated patients with complaints of pain and no objective findings. *Id.* at 26. Regarding the Claimant's physical limitations, Dr. Moskowitz stated that he should have some breaks from walking. He also stated that if the Claimant has a nerve root impingement, he could possibly have a problem standing all day on an eight hour shift with the normal breaks or sitting all day. *Id.* at 27. Dr. Moskowitz testified that he did not have firsthand knowledge of the physical requirements of the hotel desk clerk, security guard and Walmart greeter positions listed in the labor market survey. *Id.* at 28. Finally, Dr. Moskowitz testified that the Claimant's upper extremity paresthesias were related to the assault in late 1993, although he acknowleged that the bulging discs shown on the MRI scan in the Claimant's cervical spine could have caused this condition. *Id.* at 29-30. He initially discounted the cervical disc protrusions as a cause based on his assumption that this abnormality first appeared on an MRI taken after the assault, but he later admitted that the January 1993 MRI, which was taken prior to prior to the assault, contained "fairly similar" findings of cervical disc protrusions. *Id.* at 30-33.

IV. Findings of Fact and Conclusions of Law

The parties have stipulated that the Claimant sustained two injuries which arose in the course and within the scope of his employment – on March 16, 1990 when he fell off of a ladder at work, injuring his hand, neck and back and on April 21, 1995 when he injured his back while pulling on tape at work. They have also stipulated that disability resulted from both injuries. The controversy between them centers on the nature and extent of any disability caused by these injuries and whether the Claimant's average weekly wage from 1990 or 1995 should be utilized in determining the amount of any compensation due. It is the Claimant's position that he has been totally and permanently disabled since March 1, 1997 when his employment with the Murphy Rubbish Company ended. Accordingly, he seeks an award of permanent and total disability benefits based on the stipulated average weekly wage as of April 21, 1995, $601.00. He also seeks payment of reasonable and necessary medical care and an award of 30% permanent partial disability to his left upper extremity based on the stipulated average weekly wage as of March 16, 1990, $463.60. Claimant's Memorandum of Law at 20. The Employer counters that the Claimant is not totally disabled as the reports and testimony of its vocational expert, Ms. Dolan, establish that he has a significant residual earning capacity. Thus, the Employer contends that any award to the Claimant should be reduced by not less than $320.00 per week based on Ms. Dolan's testimony that the Claimant is capable of performing full-time jobs paying between $7.00 and $9.00 per hour. Respondent's Post-Hearing Memorandum at 8-10. The Employer additionally contends that, assuming that the Claimant's left hand injury is related to the March 1990 accident, he is entitled to a 2% permanent partial disability award, at most. *Id.* at 8.

A. Claim for Permanent and Total Disability Compensation

1. Nature and Extent of the Claimant's Disability

In a claim for disability compensation that is not based on the schedule of losses in section 8(c) of the Act, a claimant has the initial burden of establishing that he can not return to his usual employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc*., 14 BRBS 689, 693 (1982). To determine whether the Claimant has carried his *prima facie* burden of establishing that he is unable to return to his usual employment as an outside machinist, I must compare the medical opinions regarding his physical limitations with the requirements of his usual work when he was injured on March 16, 1990. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988). The Claimant testified that the outside machinist job required him to climb, lift and carry heavy equipment, and work in confined spaces. All of the physicians who specifically addressed the question are in agreement that the Claimant has significant physical limitations that impact on his ability to perform work, and the Employer has offered no evidence to contradict the Claimant's testimony that he is unable to return to his usual employment as an outside machinist because of his physical limitations. On this record, I find that the Claimant has met his burden of proving that his work-related injuries prevent him from returning to his usual employment.

Since the Claimant has established that he is unable to return to his former employment because of work-related injuries, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981) (*Gulfwide Stevedores*); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989). If the Employer does not carry this burden, the Claimant is entitled to a finding of total disability. *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976); Rogers Terminal and Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691 (5th Cir. 1986). To satisfy its evidentiary burden, "the employer does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo*, at 74, citing *Gulfwide Stevedores* at 1042-43. Once an employer satisfies its burden, a claimant may rebut the showing of suitable alternative employment by establishing "that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo*, at 74, quoting *Gulfwide Stevedores* at 1043.

Ms. Dolan, the Employer's vocational expert, identified several job openings in her December 2000 and March 2001 labor market surveys. In view of Ms. Dolan's testimony that the security positions may require significant walking and standing, and considering the Claimant's inability to

successfully perform the security guard job at the Foxwoods Casino, I have disregarded the security guard and casino host jobs as evidence of suitable alternative employment. I have also disregarded the assembler jobs based on Ms. Dolan's testimony at the hearing that these jobs would not be appropriate. Finally, I have discounted the Walmart "greeter" position based on Ms. Dolan's testimony that Walmart does not want its greeters to sit while working. This leaves the two hotel desk clerk and one customer service representative jobs in the December 2000 survey and the three hotel desk clerk jobs and the customer service representative job at Gerard Nissan in the March 2001 survey. The Claimant testified that he felt that he could perform the customer service job because it primarily involved sitting at a desk and calling customers. In addition, I note that this job is comparable in terms of physical demand to the job that the Claimant successfully performed at Murphy Rubbish until the company closed in March 1997. Accordingly, I find that the Employer has made the requisite showing that the customer service job is one which the Claimant could successfully perform and which he could secure if he diligently tried. Based on Ms. Dolan's testimony that the hotel desk clerk jobs would accommodate the Claimant's need to alternate between sitting and standing, I also find that the Employer has shown that these positions are ones which the Claimant could perform and secure with diligent effort. However, the Employer has not shown on this record that suitable alternative employment existed before December 2000 when Ms. Dolan's first labor market survey was prepared, and its showing of suitable alternative employment as of December 2000 "may not be applied retroactively so as to commence partial disability status before suitable alternative employment is shown to exist." *Palumbo* at 77. *See also Director, OWCP v. Berkstresser*, 921 F.2d 306, 312-13 (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258-60 (9th Cir. 1990).

The next question to be addressed is whether the Claimant has rebutted the Employer's showing of suitable alternative employment by demonstrating that he could not secure employment despite exercising reasonable diligence in attempting to obtain work within the scope of employment opportunities shown by the Employer. In an effort to establish rebuttal, the Claimant introduced a "Record of Employment Contacts" which, in conjunction with his testimony, shows that he made a total of 98 job contacts between February 1999 and March 2000, but was only hired for one, the security guard job at Foxwoods Casino that he was unable to perform. CX 61. Although this record of contacts shows the names of the employers contacted, including three hotels or motels,[5] it does not indicate whether these employers had any vacant positions, whether the Claimant applied for any specific jobs, or, if he did apply for specific jobs, whether the he jobs applied for were ones he was qualified to perform based on his physical limitations and vocational background. Significantly, there is no evidence that the Claimant applied for any of the five hotel desk clerk jobs identified by Ms. Dolan, and, as noted above, the record is at best unclear as to the outcome of his application for the customer service representative job at Gerard Nissan. In my view, this evidence fails to establish that the Claimant exercised reasonable diligence in attempting to secure a job within the compass of

[5] The three hotels the Claimant reported contacting are the Best Western, Suisse Chalets and Groton Inn & Suites. CX 61 at 12-13.

employment opportunities shown by the Employer to be reasonably attainable and available in his community. Indeed, the fact that the Claimant was able to secure work as a dispatcher/customer service representative at Murphy Rubbish and successfully perform this job strongly suggests that he could once again find gainful employment if he made a sincere effort to pursue available work, such as the hotel clerk and customer service jobs, that is compatible with his physical limitations.

Based on the foregoing findings, I conclude that the Claimant has established that he was totally disabled from March 1, 1997 until December 2000 when the Employer demonstrated the availability of suitable alternative employment. Because the Claimant has failed to rebut the Employer's showing of suitable alternative employment, I further conclude that the Claimant's disability since December 1, 2000 has been partial. I will now turn to the question of whether the Claimant's disability is temporary or permanent.

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp*., 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. The determination of when maximum medical improvement is reached so that claimant's disability may be characterized as permanent is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). In this case, the physicians who considered the question of permanency all agreed that the Claimant reached maximum medical improvement from his work-related injuries well before March 1, 1997. Dr. Zeppieri concluded that the Claimant reached maximum medical improvement from his neck and back injuries by June 5, 1994. RX 15. In April 1996, Dr. Himmel reported that the Claimant's disability status was unchanged; RX 35; and Dr. Moskowitz opined at the time of his October 2000 examination that the Claimant had reached maximum medical improvement with regard to all of his injuries years earlier. RX 28. Accordingly, I find that the medical evidence of record establishes that the Claimant's disability became permanent at least by March 1, 1997.

2. Amount of Compensation Due

Pursuant to section 8 of the Act, the amount of the Claimant's disability compensation is determined by his average weekly wage. 33 U.S.C. §908. In cases involving traumatic injuries such as those involved in the instant claims, the average weekly wage is calculated as of the time of injury for which compensation is claimed. 33 U.S.C. §910; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 149 (1991); *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 104 (1991); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196, 200 (1989); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 193 (1984); *Hasting v. Earth-Satellite Corp.*, 8 BRBS 519, 524 (1978), *aff'd in pertinent part*, 628 F.2d 85 (D.C. Cir.1980), *cert. denied*, 449

U.S. 905 (1980). The Claimant contends that his compensation should be based on the stipulated average weekly wage of $601.00 at the time of his April 1995 injury, while the Employer avers that the March 1990 injury should control the average weekly wage determination. Inasmuch as the parties have stipulated that the Claimant suffered a second injury to his back resulting in disability in April 1995, I conclude, in agreement with the Claimant, that the $601.00 average weekly wage as of the time of that second injury is applicable. *Compare Kooley v. Marine Indus. N.W.*, 22 BRBS 142, 146 (1989) (aggravation of a previous traumatic injury constitutes a new injury which entitles the claimant to benefits based on the wages earned immediately prior to that injury) *with Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 68 (2d Cir. 1985) (where there is neither evidence nor a finding of a second injury or that the claimant's work activities aggravated a pre-existing condition, the average weekly wage must be fixed as of the date of the original injury).

Based on the average weekly wage of $601.00, the Claimant is entitled to permanent total disability compensation pursuant to section 8(a) of the Act at a compensation rate of $400.67, which is equal to 66 2/3 per centum of the average weekly wage, for the period commencing March 1, 1997 through November 30, 2000. 33 U.S.C. §908(a). The Claimant's entitlement to compensation commencing December 1, 2000 is controlled by section 8(c)(21) of the Act which provides that in cases of permanent partial disability not covered by the schedule of losses "compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability." 33 U.S.C. §908(c)(21). Calculating the amount of compensation under section 8(c)(21) therefore requires a comparison of the Claimant's pre-injury average weekly wage ($601.00) with his post-injury wage-earning capacity. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 60 (2nd Cir. 1989). Since the Claimant has not secured alternate employment or been offered any post-injury work by the Employer, it is appropriate to use the earnings established for the suitable alternate employment on the open market to fix his wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 42-44 (1996). As discussed above, the Employer has shown that hotel desk clerk jobs are available in the Claimant's community at starting wage rates between $7.00 and $9.00 per hour. Accordingly, I will use the $8.00 per hour average starting wage as fairly representative of the Claimant's post-injury wage earning capacity. Since the Employer's evidence also establishes that these jobs are available for 40 hours per week, I find that the Claimant has a post-injury wage-earning capacity of $320.00 per week ($8.00 x 40 = $320.00). Based on this calculation, I find that the Claimant has suffered a loss of wage-earning capacity in the amount of $281.00 per week (the difference between his average weekly wage and his wage-earning capacity) and, pursuant to section 8(c)(21), he is entitled to permanent partial disability compensation at the rate of 66 2/3% of that difference, or $187.33 per week.

B. Claim for Permanent Partial Disability Compensation

In addition to his claim for compensation based on his lost earning capacity, the Claimant seeks an award of permanent partial disability compensation for the loss of use of his left upper extremity. In

this regard, section 8(c)(1) of the Act provides for 312 weeks of compensation for the loss of an arm, and section 8(c)(3) provides for 244 weeks of compensation for the loss of a hand. Because a claim for compensation for loss of an arm or hand falls under the schedule of losses set forth in section 8(c) of the Act, it may be pursued without any proof of actual loss of earning capacity. That is, section 8(c) effectively provides that a loss of wage-earning capacity and its extent are "conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment." *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955).

The threshold issue is whether the Claimant's loss is to his arm or hand. As summarized above, the findings and diagnoses relating to the Claimant's left upper extremity following the March 16, 1990 injury were limited to the left hand. Dr. Carlow assessed status post laceration and tendonitis involving the left extensors on the dorsum of the left hand. CX 2; RX 2, 3. Dr. Willetts reported an assessment of trauma to the left hand with edema superimposed on pre-existing severed extensor tendons to the long, ring and small fingers. CX 3. Dr. Dubler provided a diagnosis of status post multiple extensor tendon lacerations, left hand with newly diminished grip strength. RX 6. There is no evidence that the Claimant sustained any trauma to his wrist, elbow or forearm, and there is no evidence that he complained of symptoms to any part of his left upper extremity outside of the hand related to the March 16, 1990 injury. Although the record does show that the Claimant later complained of paresthesia in both arms, particularly the right, there is no medical evidence that these complaints were related to the March 16, 1990 hand injury. Rather, the medical evidence clearly indicates that the Claimant's upper extremity symptoms are attributable to his cervical spine abnormalities and, possibly, the head trauma he suffered secondary to the assault in 1993. Therefore, this is not a case where section 8(c)(1) may be invoked because the Claimant suffered a either direct injury to an arm resulting in symptoms in a hand or an injury to a hand resulting in impairment to an arm. *Cf. Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 416-17 (1989) (award under section 8(c)(1) is appropriate where injury to forearm resulted in partial loss of use of claimant's hand). Accordingly, any award for the loss of use of the Claimant's left hand must be made under section 8(c)(3).

Next to be considered is the nature and extent of any left hand disability. Drs. Dubler and Cherry both noted that the Claimant demonstrated a loss of grip strength in his left hand which they related to the March 16, 1990 injury. RX 6: RX 20. Dr. Cherry assessed the Claimant with a 2% permanent disability of the left hand; RX 20; but Dr. Himmel, the Claimant's treating physician, provided a markedly higher permanent disability rating of 30%. CX 63. On the other hand, Dr. Zeppieri was of the opinion that the March 16, 1990 injury did not aggravate the Claimant's pre-existing left hand condition and that there was no loss of function in the Claimant's left upper extremity. RX 13, 18. Dr. Stratton similarly concluded that the Claimant's left hand condition was due to the earlier injury in 1965, not the March 16, 1990 injury. CX 36, 37. And, Dr. Moskowitz stated that he disagreed with Dr. Cherry's assessment of even a 2% disability as he found no objective evidence if impairment. RX 28. Upon reviewing these conflicting opinions, I find that the weight of evidence establishes that the Claimant sustained a second injury to his left hand on March 16, 1990 which

aggravated the pre-existing condition of this extremity. In making this finding, I am persuaded that conclusion reached by Drs. Dubler and Cherry that the Claimant's left hand condition is related to the March 16, 1990 injury is better reasoned and better supported by the objective medical evidence because they specifically relied on the evidence diminished grip strength subsequent to March 1990.

Regarding the extent of any permanent disability, I decline to accept the 30% rating assigned by Dr. Himmel because it is unsupported by any objective evidence that the Claimant suffers from functional limitations of this severity. Rather, it appears that Dr. Himmel's assessment rests primarily on the Claimant's subjective complaints of pain. While pain is a legitimate factor to consider in establishing a compensable loss of use, an impairment rating can not be amplified to compensate a claimant for pain and suffering in addition to his functional loss. *Pimpinella v. Universal Maritime Service, Inc*., 27 BRBS 154, 159 (1993); *Young v. Todd Pacific Shipyards Corp*., 17 BRBS 201, 204 (1985). I also decline to accept the no disability opinions from Drs. Zeppieri and Moskowitz because the record does not show that they fully considered the Claimant's loss of grip strength. Instead, I find that the 2% rating from Dr. Cherry is supported by a thorough physical examination and review of the Claimant's medical records, and it is consistent with the objective evidence. Accordingly, I will adopt it and award the Claimant compensation pursuant to section 8(c)(3) based on the stipulated average weekly wage at the time of the March 16, 1990 injury.

The final consideration in calculating the amount of compensation due the Claimant is the date on which his left hand disability became permanent. None of the physicians appears to have specifically addressed the date of maximum medical improvement. Clearly, any disability had become permanent by the time of Dr. Cherry's examination in February 1999. In addition, Dr. Dubler appears to have considered the Claimant's restrictions on the use of his left hand to be permanent at the time of his examination on July 10, 1990. RX 6 at 3. That the Claimant's left hand condition had reached a point of maximum medical improvement by this date is supported by the absence of any evidence that he received any ongoing treatment or recommendation for surgery. Therefore, I find that the Claimant's disability involving his left hand became permanent on July 10, 1990, and I will award him 4.88 weeks of compensation pursuant to section 8(c)(3) at the rate of $309.07 (66 2/3 per cent of the average weekly wage of $463.60).[6]

[6] Since this award does not run concurrently with the Claimant's award of permanent total disability under section 8(a), the total compensation awarded will not exceed the statutory maximum permitted under section 6(b) of the Act. 33 U.S.C. §906(b); *Hansen v. Container Stevedoring Co.*, 31BRBS 155, 158-59 (1997); *Korineck v. General Dynamics Corp*., 835 F.2d 42, 43-44 (2d Cir. 1987).

C. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Accordingly, I will order that the Employer pay for any future medical treatment which may be reasonable and necessary for the Claimant's March 16, 1990 and April 21, 1995 work-related injuries.

D. Credits for Prior Voluntary Compensation Payments

In view of the parties' stipulation that the Employer has made prior payments of temporary total, temporary partial and permanent partial disability compensation to the Claimant, I find that the Employer is entitled to a credit under section 14(j) of the Act in the amount of these prior payments. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989), *aff'd on recon*., 23 BRBS 241 (1990); *Nichols v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 710, 712 (1978).

E. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp*., 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney's Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993). The Claimant's attorney has filed an itemized application for attorney's fees and costs for work performed before the Office of Administrative Law Judges in the amounts of $12,305.00 and $446.24, respectively, for a total of $12,751.24. The Employer responds that although the requested fee seems high, it does not object in the event that the Claimant prevails on his claim for permanent total disability. Upon review, I find that the fee application complies with the requirements of 20 C.F.R. §702.132(a) and that the fees and costs requested are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded. While the Claimant only achieved partial success in claim for permanent total disability, I have concluded, after noting that the Claimant did not fail to prevail on any claim that is unrelated to the claims on which he did prevail, that any reduction in fees is not warranted as the Claimant achieved a level of success by establishing entitlement to a period of permanent total disability and medical care that makes the hours expended by his attorney reasonable and a satisfactory basis for an award. *See Rogers v. Ingalls Shipbuilding*, 28 BRBS 89, 91-93 (1993), citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Accordingly, I will order the Employer to pay attorney's fees to the Claimant's attorney in the amount of $12,751.24.

G. Conclusion

In sum, I have concluded that the Claimant is entitled to an award, to be paid by the Employer, of scheduled permanent partial disability benefits for the loss of use of his left hand, permanent total disability compensation benefits from March 1, 1997 to November 30, 2000 and permanent partial disability compensation from December 1, 2000 to the present and continuing, all of which are subject to the Employer's credit under section 14(j) for prior voluntary payments of compensation. I have further concluded that the Employer is liable for reasonable medical care necessitated by the Claimant's work-related injuries, attorney's fees and interest on unpaid compensation.

V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Electric Boat Corporation, shall pay to the Claimant, Charles J. Tasca, Jr., 4.88 weeks of permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(3) commencing July 10, 1990 at the rate of $309.07 per week;

2. The Employer shall pay the Claimant permanent total disability compensation benefits pursuant to 33 U.S.C. §908(a) from March 1, 1997 to November 30, 2000 at the weekly compensation rate $400.67 plus any applicable annual adjustments provided in Section 10 of the Act;[7]

3. The Employer shall pay the Claimant permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(21) at the rate of $187.33 per week from December 1, 2000 to the present and continuing;

4. The Employer is entitled to a credit pursuant to 33 U.S.C. §914(j) in the amount of its past payments of temporary total, temporary partial and permanent partial disability compensation;

5. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries of March 16, 1990 and April 21, 1995 may require pursuant to 33 U.S.C. §907;

6. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

7. The Employer shall pay to the Claimant's attorney, Carolyn P. Kelly, attorney's fees and costs in the amount of $12,751.24 pursuant to 33 U.S.C. §928(a); and

8. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A
DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd

[7] Annual adjustments pursuant to section 10(f) of the Act are payable on October 1st of each year once a claimant acquires status of permanent total disability. *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir. 1990). The Claimant acquired such status prior to March 1, 1997.